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In the Supreme Court of the United States.

OCTOBER TERM, 1882.

ROBERT P. DODGE, *Appellant*,
vs.
FREEDMEN'S S. & T. CO. } No. 110.

Authorities for Appellant.

I.

As to equitable jurisdiction:

Baker & Riddle, 1 Bald. C. C., 394. Opinion by Baldwin, J.:

"The first question made in this case is jurisdiction." [Cites the Constitution, 2d article, 2d section, and the 16th section of the Judiciary Act; and says]:

"It is enough for the purposes of justice that one tribunal is open to every party, competent to give a remedy for every wrong; he ought to be compelled to resort to that which is appropriate to his case and ask his remedy with the incidents attached to it. This court has been organized on this principle with limited powers; it cannot sustain a suit at law as an equitable right only, adjudge a remedy appropriate only to equity, or sustain a suit in equity on a mere legal right for which the law affords a complete remedy. 2 Cr., 444. This has been made our duty by a more imperative and safe rule than the usage or discretion of a chancellor." P. 407.

* * * * * *

"In the courts of the United States an objection to the

jurisdiction of the court or to the want of equity in the bill has never been overruled for the want of demurrer or plea, but has been sustained wherever the defect appears by the bill, the answer or the proofs in the cause. It may be made * * after a decree *pro confesso*, a reference and report of a master. * * When urged in argument the objection is considered in the nature of a demurrer to the bill for want of equity, [1 Mass., 270.] * * We must, therefore, take the law of equity to be settled that a defendant may at any stage of the cause rely on the want of equity in the bill on the ground that the plaintiff has a complete remedy at law." P. 416.

[After giving a history of the contest in England, the court says]:

"To avoid the confusion arising from this conflicting struggle for jurisdiction between the different courts of common law and equity, Congress vested the powers of both courts in the circuit courts, and did what the Commons of England could not effect, prohibited their exercise of equity powers in cases where the legal remedy was complete. Usage, therefore, is no test of the jurisdiction in the federal courts. They cannot act (in the language of Buller, justice,) as the Lord Chancellor does in the plenitude of his power, [3 D. & E., 161], but must proceed by the line drawn by the Constitution. It is no excuse for disregarding it because courts of equity elsewhere act on another rule."

In Pierpont *vs.* Fowle, 2 W. & M., 23, Woodbury, J., says:

"My own impression is that * * it was the design of our fathers in that clause of the Judiciary Act not to permit proceedings to go on in chancery if it turned out in the progress of the inquiry that full and adequate relief could be had at law, and, therefore, no necessity existed to go into chancery, or after being in, to proceed further there." P. 33.

In Foster et al. *vs.* Swasey et al., 2 W. & M., 217. A. D., 1846, the bill alleged that the defendant had committed a fraud upon the plaintiff by passing to him for lumber a worthless promissory note of third parties. "A disclosure was also asked as to certain facts material in the case, and after being made, a decree was requested for such other relief as the case and equity may require." P. 218.

The court said in substance, that the averment of fraud and the asking for discovery as to material facts gave jurisdiction, but the relief sought against the fraud was only such as seemed to be obtainable at law, and in such cases it had been held, under the 16th section of the Judiciary Act, that the case could not proceed in equity. "I have been inclined to the latter opinion, and, hence, would not proceed to sustain the jurisdiction longer in equity than to obtain the disclosure, if it was not well settled in my judgment that having once obtained jurisdiction of a case in equity on proper grounds, *and what remains to be done being still a proper subject for equity*, it is taken out of the operation of the 16th section of the Judiciary Act. The court of equity may, in such a case, proceed to finish, if deemed expedient, and if a good ground in equity is set out, rather than send the parties to new actions and longer delays in the courts of law."

"An additional reason for continuing to act in equity here is, that some material facts have been obtained by the discovery, and in rescinding the contract for fraud, if void, some conditions may be imposed as to the return of the note which could not be at law." P. 221.

Decree that the note be restored to the defendant on his paying the amount, and that he pay the said amount with interest.

McCalmont *vs.* Lawrence, 1 Blatchford, 232. A. D., 1846.

Bill filed by judgment creditor to set aside a conveyance which Lawrence had made just before judgment rendered with fraudulent intent to hinder and delay the creditor. Held, that the court would not only set aside the conveyance, but would give full relief without referring the matter to the process of a court of law, saying: "For chancery, having acquired jurisdiction of the subject-matter because of the fraud, will apply the property fraudulently conveyed to the satisfaction of the prosecuting creditor pursuant to its own method of proceeding." P. 235.

Hepburn & Dundas *vs.* Dunlop & Co.; Dunlop & Co. *vs.* Hepburn & Dundas; 1 Wheaton, 179.

Agreement between parties for settlement of accounts and payment of balance when ascertained in bills of exchange, currency, claim on a third party or lands at debtor's option.

Debtor filed bill for specific performance; defeated on a technical point; then creditor filed bill to rescind agreement to accept payment; debtor, defect being remedied, filed bill for specific performance.

Two last-mentioned cases coming on to be heard together: *Held*, that dismissal of debtors' first bill would be a bar to the second, which otherwise would be sustained, and the court proceeded:

"But if the contract ought not in conscience to bind one of the parties, as if he acted under a mistake or was imposed on by the other party or the like, a court of equity will interpose and afford a relief, which a court of common law cannot, by setting aside the contract, and having thus obtained jurisdiction of the principal question, that court will proceed to make such other decree as the justice and equity of the case require." P. 197.

Held, also, that the bill filed by the creditor must be

construed as a bill for specific relief. Upon reviewing the case, the court say: "It would seem to follow that *an execution of the contract was intended to be asked for* in case the specific relief should be denied. For those reasons the court will decree a specific performance as far as it is practicable and considering," &c., &c. P. 200.

In Hipp *vs.* Babin, 19 Howard, 278, this Court said:

"And the result of the argument is that whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

In Insurance Co. *vs.* Bailey, appeal from the Supreme Court of the District of Columbia, 13 Wall., 620, this Court cited and affirmed this part of the opinion in the case of Hipp *vs.* Babin. The Court said:

"Suits in equity, the Judiciary Act provides, shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law, and the same rule is applicable where the suit is presented in the chancery court of this District."

In the same case this Court further said:

"Notice having been given and the required proof furnished, the obligation to pay became fixed by the terms of the policy and the sums assured became a purely legal demand, and if so it is difficult to see what remedy more nearly perfect and complete the appellants can have than is afforded by their right to make defence at law, which secures them the right of trial by jury." P. 622–3.

In Noonan *vs.* Lee, 2 Bl., 509, this Court said, "the equity jurisdiction of courts of the United States is derived from the Constitution and laws of the United States." And the courts of the United States could not then [Term of 1862–3] in a suit to foreclose a mortgage, make a decree directing the defendant debtor to pay the balance unsatisfied after exhausting the proceeds of the mortgaged premises.

In Orchard *vs.* Hughes, (1 Wall., 77,) this Court said the disability applied as well to a court of the Territory of Nebraska as to the United States courts in a State.

The District of Columbia is governed solely by acts of Congress. The act of February 27, 1801, 2 Stats., 103, adopted *en bloc* all the laws of Maryland then in force in this District, and made them laws of the United States and not of Maryland.

The Insurance Co. *vs.* Bailey, 13 Wall., 620, was a case brought up from the District of Columbia, and it was decided upon the 16th section of the Judiciary Act, which was thus held to be applicable to the court of this District.

II.

As to the construction of the act of 1867 :

Sedgwick, in his Constitutional and Statutory Law, 2d ed., ch. vii, discusses the matter of "liberal or equitable construction." Cites the cases, nearly all English, which favor liberal construction, and says that in these cases and more that might be cited, laws have been construed, not merely without regard to the language of the legislator, but in defiance of his expressed will. P. 261. He says : "The process therefore in these cases is not obedience to

legislative intention ; it is not construction of a doubtful provision ; it is a violation of the words of the statute in order to make a rule according to the judicial notions of right. It is purely and strictly judicial legislation." * " In analysing the above cases it will be found, as I have said, that they almost all consist in simply excepting out of the statute some particular class of cases, either on the ground of policy or hardship, or on the notion that the case before them is a *casus omissus*, or omission on the part of the legislature. All these practices have been condemned by the tribunals of both England and America in language that leaves little to be done but to collect and collate the authorities." 'We are bound,' says Mr. J. Buller, in an early case in the King's Bench, 'to take an act of Parliament as they have made it. A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws ; nor can I conceive that it is our province to consider whether such a law that has been passed be tyrannical or not.'" Pp. 262–3. Jones *vs.* Smart, 1 T. R., 44, 52. And, with many other cases, Sedgwick cites McIver *vs.* Ragan, 2 Wh., 25, in which this Court said :

"It would be going too far to make exceptions which the legislature has not made. * * If this difficulty be produced by the legislative power the same power might provide a remedy, but courts cannot on that account insert in the statute of limitations an exception which the statute does not contain."

And he also cites the case of Smith *vs.* Rice, 2 Sumn., 354–5, in which Mr. Justice Story said : "It is not for courts of justice, *proprio motu*, to provide for all the defects or mischiefs of imperfect legislation." And the language of that jurist in his Conflict of Laws, p. 17 is : "Arguments drawn from impolicy or inconvenience ought to have little respect. The only sound principle is to declare *ita lex scripta est*, to follow and obey."

"By the rules which are laid down in England," says the Supreme Court of the United States, in Prietman *vs.* The United States, 4 Dallas, 30, n. (1), "for the construction of statutes, and the latitude which has been indulged in their application the British judges have assumed a legislative power and on the pretense of judicial exposition, have in fact made a great portion of the statute laws of the kingdom. Of those rules of construction none can be more dangerous than that which distinguishing between the intent and the words of the legislature, declares that a case not within the meaning of a statute according to the opinion of the judges, shall not be embraced within the operation of statute, although it is clearly within the words, or *vice versa*, that a case within the meaning though not within the words, shall be embraced. We should invariably deem it our duty to defer to the expression of the legislature to the letter of the statute, when free from abiguity and doubt, without indulging in speculations either upon the impropriety or hardship of laws."

But when statutes are ambiguous and must be construed, then they must be construed strictly when a liberal construction will conflict with a fundamental law (Sedgwick, p. 266, citing People *vs.* Board of Education, 13 Barbour, 400-9, and other cases,) such as statutes taking away trial by jury (citing Looker *vs.* Halcomb, 4 Bing., 183). This last was an English case. The right to trial by jury is equally fundamental here—being secured by the Constitution, and by a fundamental law of equity jurisdiction, the 16th section of the judiciary act of 1789. R. S., sec. 723.

Act of February 22, 1867, *R. S., ch.* 64:

"SEC. 7. Publication may be substituted for personal service of process upon any defendant who cannot be found, in

suits for partition, divorce, by attachment for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens and all other liens against real or personal property, and in all actions at law or in equity which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court." R. S., 787.

SEC. 8. Publication to be made only after summons issued and returned "not to be found." And form of publication prescribed. R. S., 788.

"SEC. 9. All sales duly made in cases in which publication is substituted for personal service of process shall be good and valid, and vest any purchaser with a perfect title. R. S., 792.

"SEC. 10. The proceeding to enforce any lien shall be by bill or petition in equity, and the decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand against the defendant, shall adjudge that the plaintiff recover his demand against the defendant, and that he may have execution thereof as at law." R. S., 808.

III.

Deeds of Trust not Mortgages:

Sampson *vs.* Pattison, 1 Hare's Chancery Cases, 533. A. D. 1842.

A conveyance of land to A in trust that the same should stand chargeable with a sum of money and power of sale by A upon non-payment, is not a mortgage which can be foreclosed, but entitles the trustee to the aid of a court in effecting a sale.

The bill prayed an account and that the defendant might be decreed to pay or be foreclosed. The vice-chancellor: The only question is, what are the terms of the

contract? They are that a certain sum of money and interest shall be a charge on the estate, and if the same be not paid at a particular time the party entitled to the money shall have power to sell the estate. There is no right of foreclosure arising out of such a contract * * The frame of the instruments under which the parties claim in this case do not bring them in any respect within the principle that the decree of foreclosure proceeds upon." Relief prayed refused and leave to amend the bill and pray the aid of the court in effecting a sale.

Jenkin *vs.* Ross. 11 Eng. L. & E., 297, A. D. 1852.

Conveyance for a term of years to secure a loan—covenant to repay—sale on default; also, the creditor might enter and take rents.

Upon bill for foreclosure, Chancellor said all admitted, there could be no foreclosure, but it was contended, nevertheless, that the covenants rendered the deed a mortgage—said they did not, the plaintiff was entitled to have the land sold, and the court would see that done.

Wilmer *vs.* The A. & R. Air Line Ry. Co., 2 Woods 447. A. D. 1875.

Conveyance to trustees to secure bonds; power to sell on default; default made; bondholders file bill to sell the line extending into other States. Objected (p. 445). Court could not order the sale of property beyond its jurisdiction. The Court: "*We are not asked to foreclose a mortgage.* We are not asked to confer on the trustees any power which they do not already possess by virtue of the deed of trust, or to impose upon them any new duties, but simply to tell them what their powers are under their deed, and require them to exercise their powers for the benefit of the *cestui que trust* * * * I think what has just been said is an answer to the argument, that under the code of Georgia a mortgage can only be foreclosed when

the entire principal or an instalment of it is due. No foreclosure is asked here. The complainants seek only to exercise what they think to be their rights under the deed of trust by a sale according to the terms of the trust deed."

See, also, 15 Florida.

J. D. McPHERSON,
R. HAGNER,
For Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

ROBERT P. DODGE, *Appellant*,
vs.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY.

No. 110.

Brief for Appellant.

This cause comes up by appeal from the Supreme Court of the District of Columbia. The appellant was defendant below. This is a second appeal from a second decree in the same cause, the former being reported in 3 Otto. Only so much of the record is therefore filed as is necessary to present the new question involved.

THE CASE.

In January, 1869, the appellant purchased from one Darby a house on Congress street, Georgetown, D. C., for the sum of $13,000. He paid no part of the purchase money in cash, but gave his three promissory notes, for $2,000, $4,000 and $7,000, aggregating $13,000, all dated January 19, 1869, and payable in one year after date, with interest. To secure these notes he conveyed in trust to F. W. Jones and P. A. Darnielle the house in question, and, in addition, two other pieces of real estate in the same town. He then rented the house to Wm. S. Huntington.

In August, 1869, Huntington contracted with Dodge for the purchase of the house, and agreed to pay for it by paying Dodge's three notes at maturity. After making

this contract he treated the property as his own; he was already in possession; he ceased to pay rent; the property was transferred to him on the tax books; he paid taxes, and when, in January, 1870, the notes fell due, he took them up and showed them to Dodge in evidence of having paid them.

The notes fell due on Sunday, January 22, 1870. They were taken up by Huntington on Saturday, January 21, and on Monday, January 23, he transferred them to the Freedman's Company for full value.

On the 22d of July, 1871, the trustees, Jones and Darnielle, at the request of Dodge, released the two pieces of real estate which had been given, in addition to the Congress street house, as security for the notes, and Dodge afterwards sold one of these two pieces to Darnielle, who conveyed it to one W. L. Dunlop in trust for Emily Darnielle.

On the 17th of May, 1873, the Freedman's Bank filed its bill in the Supreme Court of the District of Columbia against Robert P. Dodge, Jones and Darnielle, trustees, and W. L. Dunlop and Emily Darnielle, alleging—

That it was the owner of the three promissory notes above mentioned;

That they were wholly unpaid ; excepting two years' interest which had been paid;

That Jones and Darnielle had released improperly the two pieces of real estate given to secure the notes.

And the bill prayed—

(1.) That the release made by Jones and Darnielle be decreed to be void.

(2.) That the subsequent sale to Darnielle and conveyance by him to Dunlop be decreed to be void.

(3.) That the three parcels of real estate be sold and the proceeds be applied to the payment of the notes.

(4.) "That the complainant may have judgment against the said defendant, Robert P. Dodge, for the amount due upon said promissory notes, and that the complainant may have execution thereof as at law."

(5.) That Jones and Darnielle be decreed to pay the complainant all loss and damage resulting from the improper release by them made.

(6.) "That the complainant may have such other and further relief in the premises as may be agreeable to equity and good conscience."

Mr. Dodge in his answer set up the facts above stated as to the sale of the property to Huntington, and the taking up by him of the notes, and relied on it as a payment thereof, and insisted that the complainant company having taken the notes after their maturity, held them subject to all equities.

The court decreed July 8, 1874 :

(1.) That the Congress street property, which was called the Huntington property, should first be sold and the proceeds applied to the notes.

(2.) That if the said proceeds were not sufficient to pay in full, then the release made by Jones and Darnielle should be set aside and declared null and void, as well as the subsequent conveyances of the property.

(3.) That the property so released should be sold and the proceeds applied to the notes.

(4.) "That the plaintiff have and recover of the defendant, Robert P. Dodge, whatever amount may remain due upon the three promissory notes mentioned and described in the bill of complaint, and made by said Robert P. Dodge, after the application thereto of the proceeds of

said sales, together with the costs of this suit, and that the plaintiff have execution therefor as at law." (Transc., p. 8.)

The defendants appealed to this court and at October term, 1876, the decree below was affirmed with $20 costs, and the case remanded for further proceedings. (Transc., p. 8.)

The court below then made a further decree appointing Mr. Totten trustee to make sale of the three pieces of property, and directing the cause to stand over until the coming in of the report of the auditor. (Transc., p. 9.)

All the property was sold and report thereof was made (Transc., p. 10) by Mr. Totten, the trustee, whereupon the court made the following order:

"That the report of sales as made by said trustee be and the same is hereby confirmed unless cause to the contrary thereof be shown on or before the 15th day of July, 1877.

"2. That the cause be and is hereby referred to the auditor to state the account of the trustee and to distribute the fund.

"3. That the auditor examine and report upon the question as to whether or not the lien claimed by virtue of the deed of trust to Charles M. Matthews, mentioned in the said report, is a valid and subsisting claim upon the said wharf property." (Transc., p. 12.)

The auditor thereupon stated accounts with schedules A, B, C and D. Schedules A and B showed the amounts of sales and expenses, and respecting C and D, he said: "Schedule C is a statement of the indebtedness of the defendant to the complainant aggregating the sum of $17,225."

"Schedule D, folios 1 and 2, shows the distribution of the nett proceeds herein, from which it will be seen that the whole of the note for $7,000 and interest remains due

and unprovided for out of the fund herein, and that there is due $386.47 on note of $4,000 with no fund applicable to the payment thereof, except a note made by B. J. Darneille and payable to the order of Thomas E. Waggaman, receiver, for $200." (Trans., p. 12.)

Thereupon the complainant moved for a personal judgment against Dodge for the balance due, and simultaneously Dodge moved to vacate so much of the decree made July 8, 1874, as declared that the complainant should recover of him the balance due after application of the proceeds of the sales.

Whereupon the court ratified the auditor's report and proceded as follows:

"And it appearing from the said auditor's report that the balance remaining due on the promissory notes mentioned and described in the proceedings in this cause is the sum of $7,386.47 with interest, it is further ordered, adjudged and decreed that the complainant, The Freedman's Savings and Trust Company, have and recover of and from the said Robert P. Dodge the sum of $7,387.47, together with the cost of these proceedings, with interest on $7,000 thereof from the 24th day of January, 1872, and with interest on the sum of $386.47 thereof from the date of this decree, and that the said Freedman's Savings and Trust Company shall have execution thereof as at law." (Transcr., p. 16.)

It is this last quoted decree which the appellant now seeks to reverse.

Assignment of Error.

The court erred in making said decree because:—

The court had no jurisdiction to render a personal decree against the defendant in a suit in equity and upon the bill filed in said cause.

I.

It may be said that the matter in this case is *res judicata* by the judgment of this court affirming the decree below of July 8, 1874 (Transc., p. 7), but the decree of that date, so far as it purported to be *in personam* was interlocutory.

It simply declared that in a contingency, which might never have occurred, to wit: the failure of the proceeds of sale to satisfy the debt, the plaintiff should recover of the defendant a sum yet to be ascertained.

It is evident that no execution could issue on such a decree, and that a further decree is necessary therefor.

The distinction between final and interlocutory decrees is clearly drawn by the Supreme Court of the United States.

A decree is final which leaves nothing to be litigated between the parties *and awards execution.*

Witenburg *vs.* United States, 5 Wall., 819.

If a judgment, though imperfect and informal, be one on which *execution may issue*, it may be reviewed on error.

Wilson *vs.* Daniel, 3 D., 404.

A decree for injunction in a patent cause and a reference to a master to take an account of profits, *is not a final one* from which an appeal lies.

Bernard *vs.* Gibson, 7 How., 650.

An appeal will not lie from a decree *in personam for damages, and referring the matter to commissioners to assess the amount thereof.*

Chace *vs.* Vasquez, 11 Wheat, 429.

On a bill by residuary legatees against executors, for their respective proportions of the personal estate, a decree that a certain sum be paid the plaintiffs, and that

the executors pay into court, when collected, the proceeds of debts due the testator, is not a final one from which an appeal will lie.

Young *vs.* Smith, 15 Pet., 287.

A decree that complainants are entitled to certain interests in the estate of a decedent, ordering an account to be taken and reserving all other matters until the coming in of the master's report, is not a final one from which an appeal lies.

Perkins *vs.* Fourinquet, 6 How., 206.

Though a decree may settle the equities of a case, yet, if there be a reference to the master to state the accounts between the parties, &c., it is not a final one from which an appeal lies.

Craighead *vs.* Wilson, 18 How., 199.
Beebe *vs.* Russell, 19 How., 283.
Farrelly *vs.* Woodfolk, Id., 288.

In chancery, a decree is interlocutory whenever an inquiry, as to matter of law or fact, is directed, preparatory to a final decision. Id.

A decree of a district court, in admiralty, that a sum is due, if the amount to be paid depend on other claims that may be established, is not a final one from which an appeal will lie.

Montgomery *vs.* Anderson, 21 How., 386.

This part of the decree was not affected by the appeal or the affirmance by the Supreme Court.

In point of *law*, it is plain that this part of the decree could not be taken up by appeal, for review by the Supreme Court.

In point of *fact*, it was not so taken up. A mere general appeal is to be construed as applying to that part of

the decree which is the proper subject of appeal. If, for instance, the decree had contained an order of reference to the master; an appeal would not be construed as applying to that; and to exclude that idea, it would not be necessary expressly to except it from the appeal. But the appeal above, or a writ of error alone, does not show what is taken up for review. It is the assignment of errors in the court above, that sets forth the cause of action and defines and limits the appeal. This assignment is now contained in the briefs of counsel in the Supreme Court of the United States. By examination of these it will be seen that the only matter taken up for review was the decision of the court below on the question of the payment of Dodge's notes and the validity of the release of the deed of trust given to secure them.

Moreover, the decree *in personam* was not reviewed by the Supreme Court. It was not legally before them for review. If error in this part of the decree had been assigned they would have been bound to disregard it.

In point of fact, they did not consider it. If there is any ambiguity in the mandate in this respect, the court may look at the opinion of the Supreme Court to assist them in expounding it.

West *vs.* Brashear, 14 Pet., 51.
Williams *vs.* Gibbs, 20 How., 535.

Their opinion shows that they did not consider, review, or affirm anything except the decree *in rem*.

The decree *in personam*, then, stands as if it had been a separate decree and had not appeared in the record, in the court above.

II.

The bill was filed for the purpose of setting aside the release executed by Jones and Darnielle. This was the real and sole legitimate purpose of the suit. Besides the

allegation of the violation of trust in exacting the release there is absolutely nothing in the bill to give jurisdiction to the court.

There is no allegation that the trustees refused to execute the trust by selling the Congress street property, no allegation that they had ever been requested to do so and until such request made they had no such duty to perform. The other two pieces of property were in the same situation when the release was set aside and declared void.

There was no allegation directly impeaching the competency of the trustees, and no prayer for their removal. The want of jurisdiction in such a proceeding to render a decree *in personam* against the defendant Dodge upon the general principles and practice of equity is so obvious as to require no argument, and we may at once anticipate the grounds on which the attempt to sustain it upon some special grant of jurisdiction rests.

It may be supposed that the decree is authorized by act of Congress of February 22, 1867, ch. 64, vol. 14, but this is clearly an error.

That act provides for the enforcement of *mere liens* by a decree in equity, which is to include a remedy *in personam*. But it does not apply to mortgages or deeds of trust. There was no right to enforce a *mere lien* by sale at common law. Hence, this section provides a remedy. But there was already a remedy by bill of foreclosure or sale under a power in case of a mortgage or by a sale under a deed of trust, and hence there was no necessity for such a provision as to them. Hence, sections 7 to 9 treat of suits for foreclosure of mortgages and deeds of trust, and for enforcement of liens, and provides the mode of proceeding against parties not found in all such cases; but when section 10 comes to provide for a remedy by sale to enforce a lien, it omits entirely mortgages and deeds of trust, for the simple reason that a remedy already existed in such cases.

A deed of trust or mortgage is not a lien. It passes an estate and creates a trust, whereas a lien was a mere right to hold, and applied at common law only to personalty, and liens affecting realty are the creatures of equity or statute.

If this section embraced deeds of trust, it would put an end to all private sales under them, as it is imperative in requiring that the proceeding to enforce *shall be* by bill in equity, &c., but the act was never considered susceptible of this construction.

It may be said that the suit was a foreclosure suit within the 92d rule of this court, which authorizes judgments *in personam* in such suits. There are several answers to this.

Before the making of that rule no such judgment could be rendered.

Noonan *vs.* Lee, 2 Black, 500.
Orchard *vs.* Hughes, 1 Wall., 77.

The rule applies only to mortgages, and a deed of trust is not a mortgage.

Charles *vs.* Clagett, 3 Md., 82.
Carson's Adm'r *vs.* Phelps, 40 Md., 96.
Snowden *vs.* Pitcher & Wilson, 45 Md., 260.
Bank Commerce *vs.* Lanahan, Ib., 396.
Stanhope *vs.* Dodge, 52 Md., 490.

In the first case a deed was made conveying land in trust to secure debts. The law of Maryland rendered necessary to the validity of a *mortgage*, an affidavit to the good faith of the consideration; no such affidavit was made, and the court held that a *deed of trust* was not a *mortgage* and an affidavit was not necessary. The same was held in the other cases.

To execute a trust is a branch of equity jurisdiction wholly distinct from the foreclosure of a mortgage.

JOHN D. McPHERSON,
RANDALL HAGNER,
Of Counsel for Robert P. Dodge.

16-47

IN THE

Supreme Court of the United States.

No. 110.—October Term, 1882.

ROBERT P. DODGE, APPELLANT,

vs.

THE FREEDMAN'S SAVINGS & TRUST COMPANY.

BRIEF FOR APPELLEE.

ENOCH TOTTEN,

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Supreme Court of the United States.

OCTOBER TERM, 1882.

ROBERT P. DODGE, APPELLANT,
vs.
THE FREEDMAN'S SAVINGS AND TRUST COMPANY.
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BRIEF FOR APPELLEE.

This is an appeal from a decree rendered by the Supreme Court of the District of Columbia.

The Freedman's Savings and Trust Company, on the 17th day of May, 1873, exhibited its bill of complaint in the Supreme Court of the District of Columbia, wherein it alleged that it owned and held certain unpaid and overdue promissory notes made by the defendant Dodge, and that certain real estate in the city of Georgetown, which had been conveyed in trust to the defendants Jones and Darneille, to secure the payment of said notes, had been unlawfully and fraudulently released from the operation of the deed of trust, and had been conveyed by defendant Dodge to the defendant Darneille, who had conveyed it to the defendant Dunlop, in trust for the benefit of the wife of the defendant Darneille.

The bill prayed for the cancellation of the release, and also of the other conveyances; for a sale of all the prop-

erty covered by the original trust deed; for the application of the proceeds to the payment of the notes and for damages, if any should be found, against Jones and Darneille. The bill also prays "that the complainant may have judgment against the said defendant Robert P. Dodge for the amount due upon said promissory notes, and that the complainant may have execution thereof as at law."

The defendant Dodge answered, admitting the making of the notes, and of the deed of trust to secure them, but insisted that the notes had been paid and extinguished through an arrangement between him and William S. Huntington for the purchase of one of the pieces of property included in the trust, and that the Trust Company obtained the notes after they were due and had been paid.

Upon the issues made up in the cause evidence was taken, and it was brought to a hearing in the special term, where the bill was dismissed; but upon appeal to the General Term, that decree was reversed, and a decree passed according to the prayer of the bill. This decree directed the cancellation of the fraudulent release and the other deeds, and the sale of the land, and it contained also the following direction:

"That the plaintiff have and recover of the defendant Robert P. Dodge whatever amount may remain due upon the three promissory notes mentioned and described in the bill of complaint, and made by said Robert P. Dodge, after the application thereto of the proceeds of said sales, together with the costs of this suit, and that the plaintiff have execution thereof as at law."

From this decree an appeal was taken by Dodge to the Supreme Court of the United States, where the decree was affirmed.—(See Dodge vs. F. S. & T. Co., 93 U. S., 379.)

After the affirmance of this decree by the Supreme Court, a sale was made of all the property by a trustee appointed for that purpose, and the proceeds arising there-

from were applied by the auditor to the payment of the three notes. After the application of the proceeds of the property, there remained the sum of $386.47 due on the two small notes, and also the whole of the note for $7,000, with interest thereon from January 19th, 1869.

Thereupon a motion was made in the Special Term for a personal judgment against Dodge for this balance, in pursuance of the original decree. When the application came on for hearing, the Justice holding the Special Term ordered that the case be heard in the first instance in the General Term.

On the hearing in the General Term the court rendered a personal judgment against Dodge, the appellant, for the balance remaining due on the notes after the application of the net proceeds of the money derived from the sale of the property.—(16.)

From that decree this appeal was taken, and the sole question is whether or not the court below possessed the power in this proceeding to render such a decree.

Points and Authorities for Appellee.

The complainant in this cause was obliged to resort to a court of chancery, a court of law having no power to deal with the case and afford adequate relief. His security upon the real estate had been wrongfully discharged by trustees, and it was necessary that the fraudulent release as well as the subsequent deeds upon the property should be first set aside by the decree of a court of chancery; in the second place, it was necessary that the property, so wrongfully released, should be decreed to be liable for the payment of the notes, and that the property should be sold and the proceeds applied to that purpose.

There were at least two matters involved in the controversy, over which a court of chancery had exclusive jurisdiction:

1. The conduct of trustees was to be investigated and errors therein corrected—the peculiar province of equity jurisdiction.

2. Several fraudulent deeds were made and put upon record, and a court of equity only could cancel them and give to the original security its former efficacy.

There can be no reasonable doubt that the equity jurisdiction was properly invoked in the case.

In cases of fraud, accident, or mistake, or where a discovery, an injunction, or an account is necessary in the interest of justice, a court of equity has jurisdiction, and having obtained rightful possession of the case for either of the purposes mentioned, the court will proceed to determine the whole matter in controversy. This is to prevent useless litigation and expense.—(Armstrong vs. Gilchrist, 2 John. Cases, 424; Jesus College vs. Bloome, 3 Atk., 262; Rathbone vs. Warren, 10 John., 587; King vs. Baldwin, 17 John., 384; Story's Eq., § § 64 k, 65, 66 to 74, and 454 to 458; Russell vs. Clarke, 7 Cr., 69; McCalmont vs. Lawrence, 1 Blatchf., 232; Foster vs. Swasey, 2 Wood. & M., 217.)

Courts of equity of general jurisdiction have always rendered judgments for the payment of money, and their rules provide for the enforcement of such judgments.

In the courts of equity in England, a decree for the payment of a specific sum of money has the effect of a judgment at law, and may be enforced by a writ of *fieri facias.* —(Adams Eq., 395; 2 Dan. Ch. Pr., 1020.) By the 8th rule in equity prescribed by the Supreme Court of the United States, it is provided that in cases where the decree is solely for the payment of money, the final process for its execution shall be a writ of execution in the form used in suits at common law in actions of *assumpsit.*

The rule of the Supreme Court of the District of Columbia on this subject is as follows: "Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of *fieri facias,* or by siquestration-attachment against real estate, goods, chattels, or credits of the defendant."—(84 Rule.)

It seems to be clear, that according to the equity practice which has prevailed from time immemorial, and

which now prevails, the court below had not only the power, but it was its plain duty to render a personal judgment for the balance due on the notes. The whole case was before the court, and the facts were undisputed.

In addition to the force of precedents and immemorial usage, we have a statute in this District prescribing the method of proceeding in cases of this kind. The tenth section of the act of February 22d, 1867, provides that "the proceeding to enforce any lien shall be by bill or petition in equity, and the decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand against the defendant, shall adjudge that the plaintiff recover his demand against the defendant, and that he may have execution thereof as at law."—(14 Stat., 404; R. S. D. C., § 808.) The decree in this case was framed upon this statute.—(See, also, Rule 92 of this court, which was adopted after the case of Noonan vs. Lee, 2 Black, 500, and of Orchard vs. Hughes, 1 Wall., 77.)

But it was and probably will be contended by counsel that the defendant Dodge has his constitutional right to a trial by jury, and that he cannot be deprived of it either by the rules of practice or by statutory law. This assumption is based upon the amendment to the Constitution, which declares that, "in all suits at *common law*, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This provision clearly relates to actions at *law*, as contradistinguished from suits in *equity*. The Supreme Court of the United States, in commenting on this amendment, uses this language: "The phrase 'common law,' found in this clause, is used in contradistinction to equity and admiralty and maritime jurisprudence. The Constitution had declared, in the third article, 'that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority,' &c.,

and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes, in courts of equity and admiralty jurisdiction, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By common law they meant what the Constitution denominated in the third article 'law,' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. * * * In a just sense the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."—(Parsons vs. Bradford, 3 Pet., 446; 3 Story on the Con., 629.)

The present application is merely to enforce the final decree formerly made in the cause. That decree was appealed from by the defendant, and it was in all things affirmed by this court. That portion of the decree providing for a personal judgment for any balance which might remain after application of the proceeds of sale, was reviewed and affirmed as well as any other portion.

The decree should be affirmed.

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